Aero Tec Laboratories, Incorporated *and* Ronald Vanore *and* Nils Person *and* Local 8-149, Oil, Chemical & Atomic Workers International Union, AFL-CIO. Cases 22-CA-11023, 22-CA-11202, and 22-CA-11203

30 March 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 8 November 1982 Administrative Law Judge James F. Morton issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions to the administrative law judge's decision and an answer to the Respondent's exceptions and a supporting brief. Thereafter, the Respondent filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Aero Tec Laboratories, Incorporated, Ramsey, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. On November 30, 1981 (all dates below are for 1981 unless specified otherwise), the Acting Regional Director for Region 22 of the National Labor Relations Board (the Board) issued and order consolidating these three cases and a first amended complaint. The amended complaint alleges that Aero Tec Laboratories, Incorporated (the Respondent) had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed an answer denying those allegations.

The issues raised by the pleadings are whether the Respondent (1) unlawfully interrogated its employees as to their activities or support for Local 8-149, Oil, Chemical & Atomic Workers International Union, AFL-CIO (the Union), (2) threatented them with more onerous working conditions and other reprisals to discourage them from supporting the Union, (3) created the impression that their activities for the Union were kept under surveillance, (4) issued a warning to an employee because he supported the Union, (5) discharged three employees because they supported the Union, and (6) refused to bargain collectively with the Union after it had been certified as the exclusive representative of the Respondent's production and shipping and receiving employees.

The hearing was held before me in Newark, New Jersey, on June 1, 2, and 3, 1982.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and by counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

The pleadings, as amended, establish and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent began operations in 1969 in Ramsey, New Jersey. It made fuel tanks for racing cars. It expanded its product line to include other safety tanks and related equipment. By mid-1981, it had about nine full-time and regular part-time production, shipping, and receiving employees who were unrepresented for purposes of collective bargaining. Its president, Peter Regna, its production manager, Stephen White, and its shop foreman, Richard Clark are conceded by the Respondent to be supervisors as defined in the Act.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Contrary to the Respondent's assertion, the complaint alleges both the interrogations and the threats. The only omission, if it be such, is that the complaint alleges that Supervisor White committed interrogations, and that Supervisor Clark committed both interrogations and threats, all during the same 2-week period in July. The conduct and its timing are clearly specified by the complaint. In view of these circumstances, and the fact that both White and Boje testified on the subject, we find no merit in the Respondent's contention that the 8(a)(1) findings should be dismissed because White was not specifically alleged to have committed threats as well as the interrogations which he was alleged to have committed by the complaint. Accordingly, we adopt the judge's finding.

Member Dennis does not subscribe to the above paragraph. In this regard, she reads the Respondent's procedural exception as specifically directed to the judge's conclusion that the Respondent violated Sec. 8(a)(1) when Production Manager White told employee Boje in July 1981, while discussing the Union, that he would have to tighten up the regulations. The judge found that this remark constituted an unlawful threat of more onerous working conditions. The Respondent contends that this finding is improper because the amended complaint alleges that only Supervisor Clark made threats of more onerous working conditions. Member Dennis finds it unnecessary to pass on the judge's finding of an unlawful threat by White. In her view, such a finding is cumulative and has no effect on the Order.

On July 6, the Union filed a petition, Case 22-RC-8563, with the Board's Newark office for an election among the Respondent's employees. An agreement to hold an election was signed on July 20 by the Respondent and the Union; at the election held on August 19, seven employees voted for the Union, one voted against it, and two others voted under challenge. A certification of representative was issued on August 27 to the Union.

B. *The Alleged Threats of More Onerous Conditions*

The General Counsel called four witnesses in support of the allegation that the Respondent, by Shop Foreman Clark and Production Manager White, had threatened its employees with more onerous working conditions in order to discourage them from supporting the Union. Those witnesses were Michael Hasch (who is alleged to have been unlawfully discharged by the Respondent, as discussed further below), Thomas Perrucci, Peter Geddes, and Kevin Boje.

Hasch testified that Clark told him in a discussion they had on July 20 that things are pretty easygoing but might have to change if the Union comes in and that the Respondent's president would then have to be stricter so that the employees will have to follow the rules more closely.

Clark testified for the Respondent that he never discussed the Union with Hasch. Later on, he testified that he told Hasch that there was a possibility that piecework could be lost depending on whatever was negotiated at the time the contract was written up. He testified further that he made a reference to instituting tighter rules and regulations if the Union won the election and explained that he had no way of knowing what was going to be negotiated. In further explication, he testified that he told Boje that it might be harder for employees "to take personal days on short notice or borrow the van or something" if the contract did not "stipulate that or if . . . . things didn't go well with negotiations . . . ."

Perrucci, who is still in the Respondent's employ, testified that Clark told him in early July that the shop would be run a lot tighter if the Union got in and that it would then be harder for an employee to take a personal day off. Geddes, who quit the Respondent's employ when suspended in September, testified that Clark told him in early July that, if the Union got in, shop management would not have the opportunity to perform piecework or work overtime and that union dues would come out of the employees' pockets. Clark did not deny Perrucci's account or Geddes' account.

Boje, the fourth witness called by the General Counsel respecting threats to impose more onerous conditions, testified that in July Production Manager White told him, while discussing the Union, that he would have to tighten up the regulations.

White was asked in his direct examination if he had made such a statement to Boje and he responded in the negative.

I credit the accounts given by the General Counsel's witnesses as, in some measure, their testimony was uncontroverted and even corroborated by Clark. Further, I find unpersuasive the summary denial by White of Boje's account.

I find that the remarks by Clark and White constituted threats to the Respondent's employees that stricter work rules would be imposed on them in order to discourage them from supporting the Union.[1]

C. *The Alleged Unlawful Interrogation*

The complaint further alleges that the Respondent, by Clark and White, unlawfully interrogated its employees about the Union. The General Counsel proffered three witnesses in support of those allegations, namely, Hasch, Person, and Boje. Hasch testified for the General Counsel that on July 20 (in the course of the same discussion referred to above) Clark asked him why he did not go to see the Respondent's president instead of the Union. Clark did not deny that aspect of Hasch's testimony. I have already credited Hasch's account that on July 20 Clark told him that things would be tightened up if the Union got in. In view of that and as Clark did not controvert Hasch's account as to the alleged interrogation, I credit Hasch's testimony thereon.

Boje testified that Production Manager White had asked him in mid-July why he, Boje, had not gone to management first with his grievances. Boje testified also that about that same time he had another conversation with White during which White brought up the subject as to which of the employees were for the Union and which were against. Boje testified that White named several employees, including Boje, as ones who might vote against the Union. Boje testified that he told White that he agreed with that view. White testified as to those discussions with Boje. Respecting the first, he testified that Boje had approached him and asked White what was going on with the Union. As to the second discussion, White's account essentially corroborates Boje's. I credit Boje's accounts of those two discussions.

The third witness called by the General Counsel respecting alleged unlawful interrogation was Nils Person who is alleged to have been unlawfully discharged, as discussed below. Person testified that in August White asked him how he got involved with the Union and that when Person responded that he looked to the Union for help as he would retire in 14 years, White told him that he should have known better. According to Person, White then walked away, saying it was "too late." White's account substantially corroborates Person's version. I credit Person's testimony thereon.

I find that the Respondent, by White and Clark, interrogated Boje, Hasch, and Person as to their support for the Union.[2]

D. *The Surveillance Issue*

The General Counsel contends that the Respondent, by its production manager White, created the impression among its employees that their union activities were subject to the Respondent's surveillance. The testimony in support thereof was recounted earlier. Boje testified that White named some employees whom he thought supported the Union and others who were against it. White

[1] *Clements Wire & Mfg. Co.*, 257 NLRB 206 (1981).
[2] *Mark I Tune-Up Centers*, 256 NLRB 898, 906 (1981).

testified that he based those remarks on his own feelings. White's remarks did not create the impression that the Respondent engaged in surveillance of union activity among its employees as it is obvious from the remark itself that White was guessing.[3]

E. *The Alleged Discriminatory Discharges of Vanore and Hasch.*

The complaint alleges that employees Ronald Vanore and Michael Hasch were discharged on July 24 because they supported the Union; the Respondent asserts that they were discharged solely for violating shop rules. Vanore and Hasch had worked for the Respondent as production employees since January and February, respectively. They signed union cards on June 18.

I have credited the testimony of Hasch that on July 20 Foreman Clark had asked him, during a conversation in which Clark had said that working conditions would get tight if the Union got in, why he did not go directly to the Respondent's president. Hasch's credited response was that he was afraid of getting fired if he did. The inference is clear to me that the Respondent was then aware that Hasch supported the Union. Boje testified credibly that in mid-July, Production Manager White had told him that White knew that Ron (Vanore) would not vote against the Union. It is obvious that the Respondent knew then that Vanore supported the Union. On July 24 both Hasch and Vanore were discharged. The General Counsel contends that the Respondent seized upon a clear pretextual reason to conceal the discriminatory nature of their discharges. The Respondent asserts that they were summarily terminated from its employ as provided for in established work rules. There is no real disagreement as to the events on July 24.

Vanore, Hasch, and other employees were playing cards during their lunch hour. When the lunch hour was over, Vanore and the others left the card table to punch in their timecards. Hasch, whose work station was next to the area where the employees had lunch, did not go with them. Instead, he walked to his work station. He called out Vanore's name to get his attention. Vanore was then on his way to the timeclock, about 1500 feet from Hasch's work station. When Vanore looked back, he observed Hasch's signaling him to punch in his timecard too. The Respondent's production manager White observed that same signal and alerted Foreman Clark to watch Vanore at the timeclock. Vanore punched in his own timecard and then Hasch's. The Respondent discharged both of them that afternoon for violating one of its written shop rules which provided that an employee must never punch another employee's timecard and that any violation will constitute grounds for immediate dismissal. The General Counsel contends that that rule was used as a pretext. In support of that contention, the General Counsel offered witnesses whose testimony is as follows.

Employee Peter Geddes testified that on several occasions in June he asked a coworker Dan Campbell and others to punch in his timecard for him notwithstanding that Production Manager White was nearby and that no one was disciplined then. Campbell testified that he punched out Geddes' card in June and that others punched his, Campbell's, card without incident. Campbell testified that he recalled one occasion when Boje punched in his, Campbell's, card and that another time White was alongside him when he called out to his coworkers to punch his card in. Campbell testified also that no discipline had been meted out for any of those incidents. Boje testified along the same lines.

White and Clark testified for the Respondent that the incident on July 24 involving Vanore and Hasch was the first time either had ever observed an employee punch in two cards, other than an occasion in June when Kevin Boje demonstrated to White, using another employee's card, how a timecard could be punched in, despite a malfunction in the clock mechanism.

I credit the accounts of the General Counsel's witnesses that employees had openly punched in cards for others and asked others to punch in their cards, that they did so in the immediate presence of White and Clark and that, prior to the advent of the Union, none were ever disciplined. The very action of Hasch on Juny 24, in calling across the shop to Vanore and in signaling him to punch in his card is consistent with that practice. It seems very unlikely to me that Hasch willfully invited his and Vanore's immediate discharge on July 24, by deliberately challenging the Respondent to impose the sanctions of its written rule, the Respondent would, in effect, have me find. More likely, Hasch and Vanore did then what had been done without incident in the past and the Respondent watched and waited for them to violate its work rule. I also credit Boje's testimony that in September White conceded to him that the discharge of Hasch and Vanore would have been "harsh" had it taken place "2 months" before, i.e., before the Union made its appearance at the Respondent's plant.

As the credited evidence demonstrates that Hasch and Vanore supported the Union, that the Respondent was aware of their support for the Union, that the Respondent had exhibited union *animus* and that the reason given by the Respondent for their discharge was based on a disparate, discriminatory application of a rule, I find that Vanore and Hasch were discharged because they had supported the Union.[4]

F. *The Alleged Discrimination Against Nils Person*

The General Counsel contends, contrary to the Respondent, that the Respondent gave employee Nils Person a written warning on September 8 and discharged him on October 2 because he supported the Union.

Person began working for the Respondent in October 1978 and by the summer of 1981 was its most experienced nonsupervisory employee. He signed a card for the Union on June 18. As noted earlier, Production Manager White told him in August that he could not under-

[3] Cf. *Checker Cab Co.*, 247 NLRB 85, 93 (1980). *Tipton Electric Co.*, 242 NLRB 202 (1979), is factually inapposite.

[4] See *Wright Line*, 251 NLRB 1083 (1980); *F.W.I.L. Lundy Bros. Restaurant*, 248 NLRB 415, 424–425 (1980). *Litton Systems*, 260 NLRB 1165 (1982), and *Prentice-Hall, Inc.*, 258 NLRB 1340 (1981), are readily distinguishable on the facts.

stand how Person got involved with the Union, that he should have gone to the Respondent's president instead and that it was then "too late" to do anything about it. Person served on the Union's negotiating committee at its only meeting with the Respondent, held on September 5. Three days later, he was given the first written warning ever issued him by the Respondent. It recited that he made mistakes on two bladders and warned him that the Respondent could not continue to waste both material and time at that rate. Person testified that he made the mistakes referred to in the notice and that that was the first time he had worked on that particular job.

On October 2, the Respondent's president Peter Regna handed him a 2-1/2-page typed memorandum and told him that he was being let go because of customer complaints. The memorandum was addressed to Person and began with a statement that a recent review of Person's work showed a "very discouraging trend." It concluded with the notice that he was terminated immediately and permanently and with the comment that Person will agree that this was best for him and the Respondent. The bulk of the typed memorandum discussed seven jobs which Person was said to have done improperly. It is necessary now to consider those reported deficiencies.

As to the first of the seven jobs, the memorandum stated that Person was "recently asked" to ship an order for Vestank parts and had filled it improperly. Person testified that in the spring of 1981 he was told that a customer had complained that a Vestank order was not filed properly. Person further testified that he and coworker Campbell checked that order and verified that it had been filled properly. Accordingly to Person, he and Campbell then told Production Manager White that the items shipped were in accordance with the order. Person testified that White responded that the customer made the mistake and that was the last he heard of that matter until October 2. Campbell's testimony corroborated Person's account.

White testified that, Person shipped the order out and that when the shipment was returned, White pulled the correct parts and reshipped the correct pieces. He denied ever telling Person that the original order had been correctly filled. Production Manager White testified that this incident occurred in May and that he himself pulled the correct order and shipped it when he learned of Person's error. No documentary evidence was offered. I credit Person's and Campbell's accounts and note that the statement in the October 2 memorandum to Person's having been "recently asked" to fill that order refers to an incident which took place 5 months previously.

The October 2 memorandum recites that on September 17 Person had made a bladder with a burn mark on it and that it was being returned for repair by a company called ARO Service. Person testified that he had probably made the bladder but he had no specific recollection of that job. His testimony was that Clark or White, as was the practice, must have inspected and approved the bladder prior to shipment. He testified that none of the Respondent's supervisors had ever commented on that job to him, until it was set out in the October 2 memorandum. Clark testified for the Respondent that he did not recall when the ARO bladder was shipped or returned; he testified that he told Person, on its return, that there was a problem with the bladder and that White would patch it.

Item 3 in the October 2 memorandum referred to a seam aligned incorrectly on a 15-gallon bladder which resulted in "yet another costly product becoming scrap." Person testified that he misaligned that job and did it over, having salvaged only the fitting. He testified also that he mentioned the error to Clark who told him simply to make another bladder. Clark testified at the hearing but did not refer to that job.

Item 4 referred to errors attributed to Person in September on certain plugs "although [he] had already produced several prototypes of [that] item." Person testified, respecting that job, that he had learned it by working with the Respondent's director of research and development and that both of them had worked together in operating the equipment to make the prototypes. He testified that when he was assigned to make those type plugs by himself, he had considerable difficulty holding parts in place and, as a result, burned his hand. Person testified that, nevertheless, some of the plugs he made were accepted for shipment and that he made replacements for the defective plugs. He also testified that he heard no complaints about his performance on that job and that the first adverse comment he received on it was the one contained in the October 2 memorandum. Incidentally, the Respondent's records show that that job was done on July 29 and not in September, as stated in the memorandum. The Respondent's director of research testified that that job could be done by only one operator; however, he conceded that he had never done it alone. The Respondent's production manager testified that he had asked Person why he did not ask for help and that Person did not respond. An employee testified that he overheard the Respondent's production manager and its director of research discuss that job and that the director of research had stated that two employees were needed to perform that job properly.

Item 5 on the October 2 memorandum states that Person erred in making four pipe plugs which had to be scrapped and to his having made the same error the following day. No date is given as to that job. Person testified that he was told by either the Respondent's production manager or its director of research and development that he had reversed the dimensions in error on that job and was told to redo the job. He testified he did not recall when that job was done but, in any event, he was not disciplined for it at least until it was cited in the October 2 memorandum. The Respondent's production manager testified that item 5 is the same matter for which the Respondent issued a written warning to Person on September 8, as related above. The September 8 warning notice referred to two bladders, not plugs.

Item 6 in the October 2 memorandum relates that Person made errors on two overhead rig bladders "last week." Person, in his testimony, disclaimed any knowledge as to those errors. The Respondent's president wrote in the October 2 memorandum that he "honestly [does not] know how your conscience would permit you to put these abominations in inventory for possible ship-

ment to an unsuspecting customer." There is no further testimony or documentary evidence which would enable me to verify the date of the alleged errors or their occurrence.

The last item discussed in the October 2 memorandum pertains to an error the Respondent attributed to Person which was the "last straw," and the "coup de grace," the one which made the Respondent's president "terror stricken" as, in his account, he "knew it could be the end of the company." According to the recital in the October 2 memorandum, Person had made two 100-gallon bladders to hold gasoline and one of them had a defective seal which caused gasoline to leak all over the boat in which it had ultimately been installed. Person testified that he had never heard of any such complaint prior to October 2. He testified that he recalled several occasions when one of the Respondent's supervisors told him that a fitting had to be resealed and that the resealing was done. On cross-examination, Person testified that several years ago when he first made flexible tanks a 100-gallon gasoline tank was returned for resealing and he did the repair.

The Respondent's production manager White testified that he had assigned Person to make two bladders and that he had inspected the defective bladders immediately on their return to the Respondent's plant. A return goods report offered by the Respondent states that a 100-gallon tank was received by it on September 10 and that it was returned because the "valve came off." White also testified that Person asked Shop Foreman Clark if he could repair that bladder and fixed it when Clark approved his request. Clark testified at the hearing but did not refer to any such request by Person. The inference I drew from White's account and also from that of the Respondent's president was that Person had been instructed not to repair that bladder until the Respondent's president himself could examine the defective seal but that Person got around that instruction by inducing th shop foreman to approve the repair before the Respondent's president return from vacation.

The Respondent's president Peter Regna testified that he made the decision in late September to discharge Person based on a review of his record which "had been deteriorating rapidly." According to Regna, he undertook a review of Person's work on receiving a memorandum from the Respondent's marketing administrator, David Dack, which stated, according to Regna, that an "irate customer," San Diego Marine, was "fit to be tied" because of a defective tank. Dack testified at the hearing but made no reference to any such memorandum: no documentary evidence thereon was offered. Regna testified that, on reading Dack's memorandum, he called the customer and was told a "horrifying tale" of gasoline having a nozzle fitting literally fall off a tank and spew a hundred gallons of fuel into a 40-foot cruiser with a crew of four abroad. Regna testified that he suspected then that Person was responsible for the defective fitting. He testified that the matter was brought to Person's attention then either through himself or someone else. He then testified that he believed that he mentioned to Person that "we had a problem" when he was out in the shop one day. He testified that he did not make an accusation then because he could not pin it down as he did not have the bladder. Regna testified further that he inspected the repaired bladder on his return from vacation and was also shown the defective nipple fitting by White who told him he had retrieved it from refuse after Person had pulled it from the bladder and discarded it. Regna testified that he told Person then that he had been grossly negligent but did not tell him that he would be fired. He testified that "in fact we asked [Person] to make a third bladder to send to San Diego Marine to try to mitigate their fury."

Person testified in the General Counsel's rebuttal case that he repaired the 100-gallon bladder sent to San Diego Marine and probably used a new fitting. He testified too that he had no recollection of Regna having talked to him about it but that Regna "probably did."

From the credited evidene recounted above, it is clear that (1) Person was the Respondent's most experienced nonsupervisory employee, (2) he signed a union card on June 18 and served on the Union's negotiating committee when it met with the Respondent's president at the only negotiating session held, which was on September 5, (3) he was asked by the Respondent in September why he had gone to the Union instead of to the Respondent's president, and (4) he received his first written warning ever on September 8 for errors made the first day he had ever worked alone on a new product.

The first issue is whether that warning was given him because of his union activities. In deciding that question, I note there are other factors to be taken into considerstaion. In particular it seems undisputed that the work atmosphere at the Repsondent's facility had been, for most of Person's employment there, informal and relaxed. I credit his testimony that when he made mistakes in the period prior to September they were routinely accepted and corrected. Another factor to be considered is that the employees had been told, as discussed earlier, that that the atmosphere would change if the Union got in and that the shop would be run much "tighter." Also, I credit Person's testimony that White, after having told him that he should have seen the Respondent's president instead of the Union, also informed him that he should have known better and that it was "too late." Further, I note that the Respondent had promulgated an extensive series of rules and regulations governing employee conduct and that those rules and regulations make no provision for written warnings. In weighing all of the considerations, I find that the Respondent would not have issued the written warning to Person on September 8, had the Union not "come in."[5]

Much of the same evidence considered with respect to the September 8 warning is also relevant to the issue of the alleged discriminatory discharge of Person on October 2. The Respondent asserts that an error made by Person on one of the bladders for a customer, San Diego Marine, was the "coup de grace," the "last straw" and caused its president to be "terror-stricken" when he first

[5] Only one other written warning had been issued by the Respondent. That was done on August 27 and was given to another employee, Campbell. There is no allegation that that warning to Campbell was unlawful. August 27 was the date of the Union's certification.

learned of that error and that this was because the error "could be the end of the Company." Person testified, in effect, that he had made errors at various points in his years with the Respondent, that they were handled in a routine matter, and that he had no reason, until his discharge, to think that any of the errors he had made were so serious as to place his job in jeopardy. Strangely, the testimony given by the Respondent corroborates Person's account thereon. Thus, Production Manager White's testimony makes no reference to his having expressed any concern to Person as to the asserted error on the San Diego Marine bladders. Shop Foreman Clark testified but made no reference to that matter. The Respondent's president testified first that that matter had been brought to Person's attention either by himself or by "someone else"; then he testified that he mentioned to Person when he was out in the shop one day that "we had a problem." There is no evidence in the record as to when the complaint from San Diego Marine was received or when the bladder in question had been first sent to that firm. Neither was there corroborative testimony or documentary material from the Respondent's marketing administrator Dack respecting his having received the initial complaint from San Diego Marine, although Dack testified at the hearing before me. The record evidence appears contradictory on the very matter of the nature of the asserted mistake itself. Thus, the returned goods form states that the bladder was returned because the "valve came off." Regna testified that the customer told him that the nipple fitting had literally fallen off. Yet, somehow, White testified that the retrieved the fitting from the "garbage" where Person supposedly had thrown it when repairing the bladder. Even more confusing to me is the testimony of the Respondent that, notwithstanding this egregious mistake by Person, he was ordered to make a third bladder for San Diego Marine to "mitigate their fury," as Regna put it. White's testimony even on that point is hardly corroborative of Regna's account as White testified that he was not sure when the repaired bladder was sent back to San Diego Marine. He thought it was "probably after" Person was discharged; he made no reference to a third bladder made by Person for San Diego Marine prior to his discharge.

Based on the foregoing discussion, I credit Person's account that he was never made aware of any serious error attributed to him until he was given the October 2 memorandum and I do not credit Regna's testimony that he indicated to Person before his discharge that he had been grossly negligent.

The evidence thus indicates that Person made an error at some point in his career on a bladder and that the bladder was repaired by him as a routine matter. In light of that, I see no basis for the characterization by Regna of that error as one that could be the end of the Company. The testimony offered by the Respondent respecting item 7 in the October 2 memorandum is most unpersuasive to me.

The evidence as to the other items, number 1 through 6 in the October 2 memorandum and Regna's account respecting the preparation of that memorandum, shows that he went back 5 months to a Vestank parts order and misstated the relevant events thereon; his characterization of it as an error that occurred "recently" was also inexact. The errors made by Person on items 2 and 3 were made known to Shop Foreman Clark who handled them as routine matters. Item 4 pertains to a job that likely should have been done by two employees; in any event the October 2 memorandum ignored all the factors in Person's favor. Further, Person testified credibly that Regna refused, on October 2, to listen to any explanation he had. The inference is clear that Regana was reviewing Person's work history with a view to finding mistakes and data to attribute those mistakes to Person. Item 5 involved a misreading of dimensions on an order which was promptly and routinely corrected; and the data on which the incident took place is uncertain and the Respondent's production manager apparently confused that matter with the matter discussed in item 6. As to item 6, Peson testified credibly that he had no knowledge of that asserted error and the Respondent submitted no probative evidence thereon.

The matters recounted in the October 2 memorandum are not supported by the credible evidence. Even the Respondent's own evidence thereon does not, in my judgment, support the hyperbole employed by the Respondent's president in that memorandum. In short, the reasons given by the Respondent for discharging Person were pretexts.

I find that his discharge on October 2 was based on his having supported the Union.[6]

G. *The Alleged Unlawful Refusal to Bargain*

The General Counsel contends that the Respondent, by its overall conduct, evidenced an unwillingness to bargain collectively with the Union on its certification and that the Respondent effectively failed in its obligation to bargain in good faith. The Respondent asserts that it met and discussed all matters raised by the Union and that the Union effectively refused to meet with it. The Respondent asserts further that it has been relieved of its duty to bargain collectively with the Union as all unit employees have notified it that they no longer wish to be represented by the Union.

The parties offered detailed testimony which had few differences on material points.

The Union had been certified in Case 22-RC-8563 on August 27 as the exclusive representative of the Respondent's full-time and regular part-time production, shipping, and receiving employees. Richard Dooley, the Union's president, testified that he contacted the Respondent's attorney after the Union was certified and was told that the Respondent's president Peter Regna would handle the negotiations. Dooley testified further that he then called Regna who said that he would not meet during working hours and that he would met on Saturday, September 5, at 10 a.m. Dooley agreed to those arrangements. Regna testified that Dooley telephoned him to set a date to meet, that Dooley said he wanted all employees at the meeting and asked to hold it during the business day. Regna testified that, when he of-

[6] *C. E. Wilkinson & Sons*, 255 NLRB 1367 (1981).

fered his personal time for an evening meeting, Dooley became irritated and said he would file an unfair labor practice charge and get a Federal mediator involved. Regna testified that he did not not take kindly to those threats; that he and Dooley agreed to meet on September 5, and that Dooley refused his request to send him a copy of the Union's demands or requests prior to that date. I credited Dooley's account as he impressed me as an experienced, low-key negotiator and as there seemed to be no good reason for him to want to rile up Regna and many reasons not to.

The first and only negotiating session took place on Saturday, September 5, at the Respondent's plant. Dooley testified that it began at 11 a.m. as Regna was late. The Respondent's witnesses testified Regna arrived a few minutes after 10 a.m. and that the meeting began shortly afterwards. I credit their version, not Dooley's time estimate, as one of the General Counsel's witnesses respecting that meeting testified that the meeting began at 10 a.m. and another made no reference to the starting time.

Regna stated at the outset of the September 5 meeting that he did not want any smoking or raucous behavior. Dooley testified that the Union favored that approach and that he also told Regna that he wanted it understood that the Union was there to meet with the Respondent as its equal. Dooley then presented Regna with a list of the Union's 32 demands. Regna stated he preferred that they be called "requests"; Dooley responded that the Union's custom was to refer to them as "demands." The parties proceeded to go down the list of 32 items as Dooley explained each. When he explained the union-security clause, Regna told him that he was philisophically opposed to a union shop. As to the Union's demand for a "substantial wage increase" and various fringe benefits, Regna responded that he was not interested in improving any of the benefits of his employees until he saw an improvement in productivity. Dooley testified that he explained that the Union did not control productivity, but that Respondent's supervisors did. He testified that he told Regna that the Union was committed to the principle of a fair day's work for a fair day's pay. Regna did not controvert that testimony in his account of the meeting. I credit Dooley thereon.

During the course of that meeting, the Union gave the Respondent a copy of a sample contract as a guide.[7] About noon or shortly afterwards, Regna stated that he had not had a vacation in several years and was taking one soon. He said he would look over the material given him and would discuss it with the Union on his return. The Union's representatives testified that Regna told them that he could meet with them only about 8 p.m. during the week or on a Saturday morning but, in any event, only for an hour or so each time. The Respondent's witnesses testified that the Union wanted to bargain around the clock and that Regna instead proposed to meet for reasonable periods outside work hours. I credit the accounts of the union representative as there was no apparent reason for it to call for an all night session.

Dooley testified for the General Counsel that Regna then stated he was going on a vacation and would get back to the Union on his return. Kevin Boje testified along the same line. Nils Person, also on the Union's committee, testified that the meeting broke up with the understanding that someone would "let us know when the next meeting would be." Dooley testified that he approached Regna in the reception area outside the conference room where the meeting had ended a few minutes previously and urged him to set aside more than an hour or two for the next session as his experience was that the first contract was always the hardest in getting agreement as to language. Dooley testified that Regna did not answer but instead turned and walked away.

Regna testified that the meeting ended after the proposed meeting again on September 29, after he returned from his vacation, and that Dooley objected and said he would file an unfair labor practice charge if Regna did not cooperate and that Dooley "was going to get a federal mediator after [the Respondent]."

I credit Dooley's account. As I observed earlier, he impressed me as a very even tempered man who would not be disposed to make the type assertions attributed to him by Regna. It is possible that he put on an act for Regna or even a bigger one for me while testifying but, in my judgment, that is unlikely as he did not seem to have any particular talent insofar as acting is concerned. Further, Dooley's account appears to me to be consistent with the subsequent developments discussed below.

Dooley wrote Regna on September 9, asking that Regna reconsider his stand and urged him to meet for a sufficient time to work out an initial contract. Regna responded, by letter dated September 22, which read:

> I am responding to your recent letter which arrived during my vacation.
>
> It appears from the tenor of your second paragraph that you may have forgotten our discussion of September 5th. At that time, I tried to make it clear that several problems needed resolution *before* we could discuss your list of wishes.
>
> In particular, the workers whom you represent have seemingly conspired to ruin the production element of my business. Never before have we seen such rampart absenteeism, tardiness, arrogance and total disregard for product quality. In addition, the work pace of several employees has suddenly dropped to about "half-speed."
>
> As I've stated before, ATL is *not* interested in paying more for less. Until I have some serious assurance of responsibility, accountability and productivity there is little need to discuss increased benefits.
>
> If you are resolute about solving these numberous fundamental problems, then I will be pleased to meet again on October 6th, 7th or 9th at 7:30 in my offices.

[7] The Union contends it did so at the outset; the Respondent asserts this was done just before the meeting ended. I would credit the Union's account as the sample contract would enable the parties to discuss the briefly stated demands in context.

Dooley wrote back on September 28, to accept the October 6 date. On October 2, Regna wrote Dooley as follows:

> Having not heard from you for some time, I have already scheduled my normal appointments for the next two weeks.
>
> Should you care to meet, I will make available Wednesday, October 21st; Tuesday, October 27th; or Friday October 30th at 8:00 p.m. Let us know by October 9th which date you prefer.
>
> As promised, I have read through the sample contract you submitted. It appears to me that this document is drafted for a large concern with perhaps thousands of employees. I does not seem relevant to a group of only six (6) full-time workers.
>
> In any event, I think you'll agree a contract discussion is premature until the labor commodity is defined. I am not in the market, at any price, for the kind of half-hearted, spiteful and slipshod work now being offered by most of your supporters. When you have a clear approach to resolving this problem, please call my secretary Barbara to confirm our meeting.

Dooley testified that he called the Respondent's office as soon as he received that letter and was told by a woman named Cheryl Connolly that Regna was not in. He testified he asked her to have Regna call him as soon as possible but he had not heard from Regna since, other than getting the letter set out below. Dooley went to the Respondent's plant with his negotiating committee on October 6 to keep the appointment as set out in his earlier letter. Regna did not appear then.

The Union filed the refusal-to-bargain charge against the Respondent on October 9. On October 16, the Respondent received a statement signed by its employees which stated that they wished to terminate their affiliation with the Union. On November 25, Regna wrote Dooley as follows:

> I am faced with an emergent situation in which our employees have not received salary increases for some time and in which it appears that collective bargaining will not be completed within the next few weeks. ATL is confronted with competitors now paying salaries at levels for which some of our employees have expressed an intent to leave ATL.
>
> In order to respond to this situation, ATL, without prejudice to its rights and positions in collective bargaining, intends to give its employees a salary increase in accordance with the following schedule:

Thomas Perrucci	$5.50
Kirt Mather	6.25
James Sukosky	5.25
Henry Dobson	5.50
Anthony Artale	5.35
George Smith	5.00
James Kooistra	5.75

> Any response or comments which you have should be received by December 4, 1981. Thank you.

Dooley did not respond to that letter.

The credited evidence establishes that (1) the parties met once, (2) that the Union then explained its demands, (3) that the Respondent then stated it would not consider granting any increases until it saw productivity improvements, (4) that the Respondent informed the Union it could meet only for an hour or so at a time, (5) that its president literally turned his back on the Union's request to reconsider that decision, (6) that the Respondent conditioned further bargaining on getting serious productivity assurances for the Union and, on that basis, offered a date to meet, (7) that the Respondent effectively withdrew that date when the Union accepted it and proposed a postponment of negotiations for almost a month, and (8) that, when it was apparent that the Union had given up on its efforts to persuade the Respondent to meet, the Respondent planned to grant wage increases to its employees forthwith and without any assurances from the Union respecting productivity.

The basic principles to be used in deciding whether or not a respondent has failed to bargain in good faith are well established and have been quoted as follows:[8]

> Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." In *N.L.R.B. v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960), the Supreme Court recognized that "[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract"; though "the parties need not contract on any specific terms . . . they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." And see, Cox, *The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1411 (1958). Similarly, in *N.L.R.B. v. Katz*, 369 U.S. 736–747 (1962), the Supreme Court held that the parties must refrain not only from behavior "which reflects a cast of mind against reaching agreement," but from behavior "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion." In sum, as the court of appeals stated in *N.L.R.B. v. General Electric Company*, 418 F.2d 736, 762 (2d Cir. 1969), cert. denied 397 U.S. 965, enfg. 150 NLRB 192 (1964):
>
> [T]he statute clearly contemplates that to the end of encouraging productive bargaining, the parties must take "a serious attempt to resolve differences and reach a common grounds," *N.L.R.B. v. Insurance*

[8] See *Eastern Maine Medical Center*, 253 NLRB 224, 243–244 (1980).

Agents' Int'l Union, 361 U.S. 477, 486, 487, 488 (1960), an effort inconsistent with a "predetermined resolve not to budge from an initial position." *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 154–155 (1956) (Frankfurter, J., concurring).

. . . .

A pattern of conduct by which one party makes it virtually impossible for him to respond to the other—knowing that he is doing so deliberately—should be condemned by the same rationale that prohibits "going through the motions" which a predetermined resolve not to budge from an initial decision." See *N.L.R.B. v. Truitt Manufacturing Co., supra* (concurring opinion).

The parties to collective bargaining are "required to do something more than attend purely formal meetings constituting no more than a mere pretense at negotiations." *N.L.R.B. v. Pine Nursing Home, Inc.*, 578 F.2d 525 (5th Cir. 1978). "The mere willingness of one party in the negotiations to enter into a contract of his own composition . . . does not satisfy the good-faith bargaining requirement." *Wal-Lite Division of the United States Gypsum Co.*, 200 NLRB 1098, 1101 (1972). Moreover, while there is no requirement that any party agree to specific contract proposals, the Board may consider the "reasonableness of positions taken by an employer in the course of bargaining in negotiations." *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1954). Thus, the Board must determine whether a party showed a willingness to "approach the bargaining table with an open mind and a purpose to reach an agreement consistent with the respective rights of the parties." *L. L. Majure Transport Company v. N.L.R.B.*, 198 F.2d 735, 739 (5th Cir. 1952). Ultimately, according to the First Circuit, the question whether a party "conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence." *N.L.R.B. v. Reed & Prince, supra*, 205 F.2d at 139–140. And see *Chevron Oil Company, supra*, 182 NLRB at 455.

Applying those principles to the instant case, I find that the Respondent's conduct manifested a clear intent not to reach agreement with the Union and instead it disclosed a purposeful strategy to render the collective-bargaining process futile. When Regna literally turned his back on Dooley's request that meetings be scheduled with a view toward reaching early settlement of a first contract, the Respondent exhibited a disdain for the collective-bargaining process. When Regna told the Union that he could not even consider any increased costs until he saw an increase in productivity, and berated the unit employees represented by the Union in his September 22 letter for having conspired to ruin the Respondent's "production element," the Respondent showed that it had no intention to objectively consider any of the Union's bargaining requests. I view as almost frantic the effort of the Respondent to put off the date for the second meeting and as most revealing its stated readiness to give salary increases, without any assurances by the Union as to productivity, once the unit employees got the message and notified the Respondent that they no longer wished to be represented by the Union. In sum, I find that the Respondent failed to bargain in good faith with the Union upon its certification.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce as defined in Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization as defined in Section 2(5) of the Act.
3. The Respondent interfered with, restrained, and coerced its employees with respect to the excerise of the rights guaranteed them in Section 7 of the Act by (a) having threatened to impose more onerous working conditions on them to discourage their support for the Union, (b) having unlawfully interrogated them as to their support for the Union, and (c) having engaged in the conduct described below in subparagraphs 4 and 5, and the Respondent thereby has violated Section 8(a)(1) of the Act.
4. The Respondent has discriminated against its employees in order to discourage membership in the Union by (a) having discharged Ronald Vanore and Michael Hasch on October 24, (b) having issued a written warning to Nils Person on September 8, and (c) having discharged Nils Person on October 2, and the Respondent thereby has violated Section 8(a)(3) of the Act.
5. The Respondent has failed and refused to bargain in good faith with the Union as the certified representative of all full-time and regular part-time production, shipping, and receiving employees employed at the Respondent's Ramsey, New Jersey plant but excluding all office clerical employees, professional employees, research and development employees, marketing employees, guards and supervisors as defined in the Act, and the Respondent thereby has violated Section 8(a)(5) of the Act.
6. The Respondent did not create the impression among its employees that their activities on behalf of the Union were under surveillance and the complaint allegation thereon that the Respondent by that alleged conduct has violated Section 8(a)(1) of the Act shall be dismissed.
7. The unfair labor practice above in subparagraphs 3, 4, and 5 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

I recommend that the Respondent be required to cease and desist from the unfair labor practices found herein and from like or related acts and to post an appropriate notice to employees. It should be required to bargain with the Union for a year without any question being raised concerning the Union's majority status.[9] As I have

[9] As I have found that the letter given the Respondent in October whereby the unit employees disclaimed support for the Union was the natural consequence of the Respondent's unlawful conduct, the Respondent cannot rely on it to withdraw recognition from the Union.

concluded that the Respondent unlawfully discharged Vanore and Hasch on July 24, 1981, and Person on October 2, 1981. I recommend that the Respondent be ordered to make them whole for any losses they may have suffered thereby and in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

As I have found that the warning issued Person on September 8, 1981, was unlawfully motivated, I shall recommend that the Respondent be ordered to expunge any reference to that warning in its records and notify Person in writing that that has been done and that the warning will not be used as a basis of future personnel action against him.[11]

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Aero Tec Laboratories, Incorporated, Ramsey, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating its employees concerning their support for Local 8-149, Oil, Chemical & Atomic Workers International Union, AFL-CIO (the Union).

(b) Threatening its employees with more onerous working conditions to discourage them from supporting the Union.

(c) Issuing warnings to any of its employees to discourage support for the Union.

(d) Discharging any of its employees to discourage support for the Union.

(e) Refusing to bargain in good faith with the Union as the exclusive representative of its full-time and regular part-time production, shipping, and receiving employees at its Ramsey, New Jersey plant.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the purposes of the Act.

(a) Offer Ronald Vanore, Michael Hasch, and Nils Person immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each whole for any losses suffered by reason of the discrimination against him, in the manner set forth above in the section of this decision entitled "Remedy."

(b) Expunge from its files any reference to the September 8, 1981 written warning issued to Nils Person and notify him in writing that this has been done and that that warning will not be used as a basis for furture personnel action against him.

(c) On request bargain in good faith with the Union as the exclusive collective-bargaining representative of all of the Respondent's production, shipping, and receiving employees employed at its Ramsey, New Jersey plant and embody any understanding reached in a signed, written agreement. Regard the Union as exclusive agent as if the initial year of certification had been extended for an additional year from the commencement of good-faith bargaining pursuant to this Order.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Ramsey, New Jersey plant signed and dated copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that paragraph 13 of the amended complaint is dismissed.

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[11] *Sterling Sugars*, 261 NLRB 472 (1982).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unlawfully interrogate our employees concerning their support for Local 8-149, Oil, Chemical & Atomic Workers International Union, AFL-CIO.

WE WILL NOT threaten our employees with more onerous working conditions to discourage them from supporting the Union.

WE WILL NOT issue warnings to any of our employees to discourage support for the Union.

WE WILL NOT discharge any of our employees to discourage support for the Union.

WE WILL NOT refuse to bargain in good faith with the Union as the exclusive representative of our full-time and regular part-time production, shipping, and receiving employees at our Ramsey, New Jersey plant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the act.

WE WILL offer Ronald Vanore, Michael Hasch, and Nils Person immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each whole for any losses suffered by reason of the discrimination against him.

WE WILL expunge from our files any reference to the September 8, 1981 written warning issued to Nils Person and notify him in writing that this has been done and that that warning will not be used as a basis for future personnel action against him.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all of our production, shipping, and receiving employees employed at our Ramsey, New Jersey plant and embody and understanding reached in a signed, written agreement. WE WILL regard the Union as exclusive agent as if the initial year of certification has been extended for an additional year from the commencement of good-faith bargaining pursuant to the Order issued in this case.

AERO TEC LABORATORIES, INCORPORATED